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In The

Supreme Court of the United States

October Term, 1966

No. 100

PETER KLOPFER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF FOR THE RESPONDENT

CITATION TO OPINION

The opinion of the Supreme Court of North Carolina (R. 15-17) is reported in 266 N. C. 349, 145 S. E. 2d 909 (1966).

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on January 14, 1966 (R. 17-18). The petition for a writ of certiorari was filed on April 14, 1966, and was granted on May 31, 1966 (R. 19). The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1257 (3).

QUESTION PRESENTED

In State criminal prosecutions, is an accused's right to a speedy trial circumvented when a state is allowed to take a *nol. pros.* with leave over defendant's objection?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are:

(1) Sixth Amendment to the United States Constitution

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(2) Fourteenth Amendment to the United States Constitution

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On February 24, 1964, a true bill of indictment was returned by the Grand Jury for the County of Orange, State of North Carolina, charging the defendant Peter Klopfer, with the criminal offense of Trespass in violation of N. C. G. S. 14-134. (R. 2-3, 7-8).

At the March, 1964, Special Criminal Session of the Superior Court of Orange County, State of North Carolina, the

defendant was placed on trial to answer the charge as laid in the bill of indictment. The defendant entered a plea of Not Guilty, and thereafter a mistrial was declared because the jury was unable to decide upon a verdict. (R. 3-5).

Subsequently, at the August, 1965, Criminal Session of the Superior Court of Orange County, the honorable Judge presiding granted the Solicitor's motion to take a *nol. pros.* with leave as to the trespass charge pending against the defendant. (R. 6).

The defendant objected and appealed to the North Carolina Supreme Court, that Court upholding the Solicitor's right to enter such motion as reported in 266 N. C. 349, 145 S. E. 2d 909 (1966).

ARGUMENT

AN ACCUSED'S RIGHT TO A SPEEDY TRIAL IS NOT CIRCUMVENTED WHEN A STATE IS ALLOWED TO TAKE A NOL. PROS. WITH LEAVE OVER DEFENDANT'S OBJECTION.

Petitioner, in essence, is contending that his having been subjected to criminal prosecution on the charge of Trespass, the arbitrary refusal of the State to proceed with the prosecution, as evidenced by the entry of a *nol. pros.* with leave, effectively deprived him of the opportunity to exonerate himself and impaired his ability to sustain any defense he might present in Court, thereby violating his constitutional right to a speedy and impartial trial.

The Supreme Court of North Carolina has, since its inception, recognized the right of the Solicitor, with the permission of the Court, to enter a *nol. pros.* In STATE v. FURMAGE, 250 N. C. 616 (1959), 109 S. E. 2d 563, the Supreme Court of North Carolina said, 109 S. E. 2d 563 at pages 567,.568:

"A solicitor, as a public officer and as an officer of the court, is vested with important discretionary powers. True, it is his responsibility, upon a fair and impartial trial, to bring forward all available evidence and to prosecute persons charged with crime. Even so, prior to prosecution, if he finds the available evidence insufficient to support a conviction, he may enter a *nolle prosequi* or *nolle prosequi* with leave. G. S. 15-175; WILKINSON v. WILKINSON, 159 N. C. 265, 74 S.E. 740. In S. v. Moody, 69 N. C. 529, Reade, J., said: 'It was discussed at the bar whether it is within the power of a solicitor to discharge a defendant or to enter a nol. pros., etc., or whether that is the province of the court. The rule is that it is usually and properly left to the discretion of the solicitor.' Also, see S. v. THOMPSON, 10 N. C. 613; S. v. BUCHANAN, 23 N. C. 59; S. v. CONLY, 130 N. C. 683, 41 S. E. 534; 27 C.J.S., District & Pros. Attys. Sec. 14 (1)."

The distinction between a *nol. pros.* and *nol. pros.* with leave was made in WILKINSON v. WILKINSON, 159 N. C. 265, 74 S. E. 740 (1912), at 74 S. E. page 741:

"A *nol. pros.*, in criminal proceedings, is nothing but a declaration on the part of the solicitor that he will not, at that time, prosecute the suit further. Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time. It is not an acquittal, it is true, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he be tried upon it. To prevent abuse, the power of the solicitor to issue new process upon the same bill is checked and restrained by the fact that a *capias*, after a *nol. pros.* does not issue, as a matter of course, upon the mere will and pleasure of the officer, but only upon permission of the court, which will always see that its process is not abused to the oppression of the citizen." See also, STATE v. SMITH, 129 N. C. 546.

North Carolina has long recognized that when a *nol. pros.* is entered by the Solicitor, this, in effect terminates the matter for all practical purposes on the indictment since the defendant becomes amenable to another indictment on the same charge in any court of concurrent jurisdiction. STATE v. McNEIL, 10 N. C. 183 (1822). In so treating the effect of a *nol. pros.*, North Carolina is in the majority of jurisdictions. 21 Am. Jur. 2d, *Criminal Law*, Section 519; Anno., New Prosecution in Another Court, 177 A.L.R. 423.

Therefore, it would appear that a *nol. pros.* or *nol. pros.* with leave, does, for all practical purposes, terminate the proceedings once and for all and in no way jeopardizes a defendant's standing.

In STATE v. ROWLAND, 172 Kan. 224, 238 P 2d 949, 30 A.L.R. 2d 455, defendant was indicted for the offense of uttering forged checks. No trial was had at the term of Court following the indictment, but at the subsequent term a *nol. pros.* was entered by the State. Sixteen months after the first indictment had been filed another was obtained charging the same offense. Defendant, having been found guilty, appealed, charging that under a Kansas statute, he should have been tried before the Third Term of Court following the filing of the indictment. The Supreme Court of Kansas, although granting a new trial on other grounds, said, 30 A.L.R. 2d, at page 460:

> "Whatever may be the rule in other jurisdictions, this court long ago decided that the entering of a *nolle prosequi* with consent of the trial court did not prejudice a fresh prosecution on a new information charging the identical offense set forth in the prior information. See STATE v. RUST, 31 Kan. 509, 3 P 428, and cases cited. In STATE v. HART, 33 Kan. 218, 6 P 288, it was held: 'And after a new trial has been granted on the motion of the defendant in a criminal case, the attorney for the state, with the consent of the court, may enter a *nolle prosequi* without prejudice to a future prosecution, and thereafter the defendant may be put

upon his trial and convicted upon a new information charging the identical offense set forth in the prior information.' (Syl. 3).

"In STATE v. CHILD, 44 Kan. 420, 24 P 952, it was held: 'The mere entry of a *nolle prosequi*, or the dismissal of an indictment, with the consent of the court, is no bar to the filing of another indictment or information for the same offense.

" 'Where a prosecution fails on account of a defective indictment or information, the time during which it is pending is not to be computed as a part of the time limited for prosecution; and the accused, after the *nolle prosequi* or dismissal of an indictment or information, may, within the time prescribed, be again proceeded against for the same offense.' (Syl. 1, 2)."

The Supreme Court of the United States has not held expressly that the Sixth Amendment right to a speedy trial is made mandatory in state proceedings. However, this Court had held in prior decisions that most of the other Sixth Amendment rights are in fact binding on the states through the Fourteenth Amendment. POINTER v. TEXAS, 380 U. S. 400 (1965); ESCOBEDO v. ILLINOIS, 378 U. S. 478 (1964); DOUGLAS v. CALIFORNIA, 372 U. S. 353 (1963); GIDEON v. WAINWRIGHT, 372 U. S. 335 (1963).

The North Carolina Supreme Court, in STATE v. LOWRY, 263 N. C. 536, 139 S. E. 2d 870 (1965), stated that the Federal protection of the right to a speedy trial was unnecessary since the "fundamental law" of North Carolina fully secures to the defendant the right to a speedy trial. In so holding, the North Carolina Supreme Court stated that the question of whether or not a speedy trial was afforded the defendant must be determined in the light of the circumstances of each case, and the Court has the discretion in deciding what is a fair and reasonable time.

As to Petitioner's contention that he is being denied his

right to a speedy trial, the Respondent respectfully contends that the petitioner has no right to compel the State to prosecute. The alleged denial could be used by the Petitioner, if the State in the future elects to prosecute, as a shield. However, Petitioner should not be allowed to use such a contention as a sword, compelling the State to go to the expense of a trial when obviously the Solicitor feels that "Another go at it would not be worth the time and expense of another effort".

CONCLUSION

The State of North Carolina respectfully contends that the Petitioner has not, therefore, been denied his right to a speedy trial.

Respectfully submitted,

T. W. BRUTON
Attorney General

RALPH MOODY
Deputy Attorney General

Andrew A. Vanore, Jr.
Staff Attorney